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No. 99-929

In the
SUPREME COURT OF THE UNITED STATES

Rebecca McDowell Cook,
Petitioner,

v.

Don Gralike,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

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Despite Respondent's claims to the contrary, the Petition for a Writ of Certiorari presents a significant conflict and issues of vital importance. It involves the right of the people to participate in and encourage the evolution of their government; a right which the Framers reserved to the people, but which the United States Court of Appeals for the Eighth Circuit has now denied to them. The abridgment of this fundamental right demonstrates the necessity of Court review.

1. In an attempt to defend the erroneous decision of the Eighth Circuit, Respondent attempts to minimize the importance of the issues presented in the Petition for a Writ of Certiorari.[1] The Petition presents the Court with the most fundamental issue in a representative democracy: the right of the people to participate in their own governance. It is this right the Eighth Circuit ignored by invalidating article VIII, §§ 15-22 of the Missouri Constitution. And it is this right the Court should restore to the people of Missouri.

Despite both the Respondent's and the Eighth Circuit's contentions to the contrary, our country's history is replete with examples of people participating in the development of their government.[2] In the Declaration of Independence itself, our Framers declared:

> We hold these truths to be self evident, . . . That whenever any Form of Government becomes destructive of these ends *it is the Right of the People to alter or to abolish it*, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The Declaration of Independence para. 2 (U.S. 1776) (emphasis added). In enacting the Constitution shortly after liberating the people of this nation from British tyranny, our forefathers surely did not intend to prevent future generations of Americans from peacefully exercising the "self evident" right to participate in the alteration their government.

The Eighth Circuit's opinion invalidating Missouri's instructional and informational provisions concerning term limits effectively eliminates the people's right to participate in the

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[1] Brief Opp. *passim*.

[2] *See* Pet. at pp. 14-17.

evolution of their government. Only this Court can restore this blessing of liberty and return to the people their self-evident right to participate in their government.

2. In an attempt to justify the Eighth Circuit's decision to deprive the people of their right to participate in the evolution of their government, Respondent notes that "[i]n 1789, the House of Representatives rejected a proposed 'right to instruct Representatives' that would have been one of the rights specified in the First Amendment."[3] But standing alone, the mere rejection of this addition to the First Amendment proves nothing.[4]

Under our Constitution the absence of an expressly enumerated right does not mean the people lack that right or that the Framers intended to deny the people that right. Two provisions of the Constitution establish the opposite rule: Amendment IX provides that, "[t]he enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people," and Amendment X provides that, "[t]he powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. IX. And it is these provisions of the Constitution that serve as the best guide to what the Framers

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[3] Brief. Opp. at p. 13 (*citing Miller v. Moore*, 169 F.3d 1119, 1124 (8th Cir. 1999).

[4] For a discussion of this point, *see* Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 Hofstra L. Rev. 1125, 1133 (1983) ("[i]f [a proposed amendment] is rejected, the range of possibilities [for its rejection] is much wider. It may be rejected by some legislators because they disagree with its substance (but not necessarily the same substance). On the other hand, those who agree with the substance may nevertheless vote against it as a spurious or unnecessary attempt to clarify. Simple non-action, being consistent with many explanations in circumstances not calling for consensus, has no probative value for any purpose.").

intended.[5] In light of the text of the Ninth and Tenth Amendment, the Respondent's and the Eighth Circuit's arguments that the Framers intended to deny the people the right to instruct their representatives fails. Instead, the Framers reserved this right to the people. Accordingly, this Court should grant the Petition for a Writ of Certiorari and restore this right to the people.

3. In his response, Respondent contends that the Court's holding in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), prohibits the people from communicating to themselves on their own ballot.[6] This is a wholly incorrect reading of *Timmons*. In *Timmons*, the Court held that it was constitutionally sound for a state to curtail a political party's use of the ballot as a communicative tool. But the rule that a State may curtail an activity does not logically lead to the conclusion that a State must curtail an activity. The *Timmons* Court did not issue a mandate requiring States to stamp out any communication appearing on the ballot.

Nor would such a holding comply with the Constitution. Under our Constitution, it is the States who are granted "broad power to prescribe the 'Time, Place and Manner of holding elections for Senators and Representatives'" in the absence of Congressional action. *Timmons*, 520 U.S. at 358, quoting from *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217

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[5] If we were to consider language the Framers considered and omitted, examine a proposal by James Madison and the rationale for its rejection. He proposed a prefix to the Constitution's preamble declaring "[t]hat the people have an indubitable, unalienable, and indefeasible right to reform or change their government . . . ." Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1057 (1988), citing Phillip B. Kurland & Ralph Lerner, eds., 5 *The Founder's Constitution* 25 (1987). This prefix was dropped from the Constitution because it was deemed redundant. "[T]he words, as they now stand, speak as much as it is possible to speak; it is a practical recognition of the right of the people to ordain and establish Governments, and is more expressive than any other mere paper declaration." (Remarks of Rep. Jackson of Georgia.) *Id.*

[6] Brief. Opp. at p. 18-19.

(1986).[7] The people of Missouri simply exercised the power to communicate with themselves about the actions of their elected officials. Congress has enacted no law prohibiting this type of communication. Hence, the Constitution's default provision, article I, § 4, cl. 1, which "invests the States with responsibility for the mechanics of congressional elections," controls. *Foster v. Love*, 522 U.S. 67, 118 S.Ct. 464, 466 (1997). Having chosen to communicate in a manner that has not been constitutionally prohibited, the People's right to communicate should prevail.

4. Respondent claims Petitioner waived any right to raise the Eighth Circuit's failure to sever the allegedly unconstitutional provisions of the Missouri Constitution from the provisions that raised no constitutional concern.[8] But like the Eighth Circuit before him, Respondent fails to take into consideration the provisions of the Missouri Constitution at issue. Article VIII, § 22 of the Missouri Constitution specifically contemplates severance of any unconstitutional portion of the amendment.[9] Petitioner has never suggested that any court is required to accept or reject this amendment as a whole. Rather, Petitioner has only suggested that no provision of the Missouri amendment violates the federal Constitution.

Further, Respondent fails to consider the import of Petitioner's "Questions Presented." By articulating four questions, the first of which is phrased in the disjunctive, Petitioner presented the severance issue. The Eighth Circuit held that article VIII, §§ 15-16 & 20-22 of the Missouri Constitution only ran afoul of article V of the United States Constitution.[10] By granting a writ of certiorari on

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[7] Interestingly, Respondent never acknowledges or disputes the States' authority to regulate elections.

[8] Brief Opp. at 10-11.

[9] Pet. at p. 8.

[10] Pet. App. at A22-A23 (following the Eighth Circuit's reasoning, Mo. Const. art. VIII, § 17, cl. 1 would seem to only run afoul of Article V).

the first Question Presented, this Court would necessarily consider the Eighth Circuit's failure to sever the allegedly unconstitutional provisions from the Missouri Constitution.

In striking down the entire amendment, the Eighth Circuit gratuitously ignored the severability provision. It justified this by claiming it would not "micro-manage" the Missouri Constitution.[11] So instead of using a scalpel to excise the allegedly unconstitutional provisions from the Missouri Constitution, it used a gavel to crush the will of the people and unnecessarily declare unconstitutional an entire section of the Missouri Constitution. The Eighth Circuit's action bespeaks intolerance for the views articulated in the Missouri Constitution. The sovereign will of a free People as expressed in their constitution is entitled to great respect. Thus far, it has been accorded very little and only this Court can rectify this sad situation.

CONCLUSION

The Eighth Circuit's opinion stands the Constitution on its head. As construed by the Eighth Circuit, the Constitution's provisions concerning the enactment of amendments prohibit popularly enacted laws that leave the enactment provisions unaltered, the Qualifications Clauses prohibit provisions that do not add additional qualifications, the Speech and Debate Clause insulates politicians from potential electoral consequences, and the Free Speech Clause invalidates public communication. Only this Court can set the Constitution right.

For the reasons stated in this reply, coupled with those found in the petition, the Petition for Writ of Certiorari should be granted.

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[11] Pet. App. at A23

Respectfully submitted,

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